In my view the trial judge rightly held that there was no substance in the defence of novation. I would dismiss the appeal with costs and order that the deposit in Court be paid out to the respondents against their costs.

Appeal dismissed.

V. RM. M. MEYAPPA CHETTIAR
v.
YIN KOK WEE.

[App. Civ. Juris. (Whitton, J.) August 11, 1952]

[Kuantan — Civil Appeal No. 1 of 1952]

Practice and Procedure — Sessions Court — Adjournment — Illness of witness — Evidence of medical certificate — Evidence of party essential — Refusal of Sessions Court Judge to grant adjournment — Discretion.

The respondent brought an action against the appellant in the Sessions Court of Kuantan for the sum of $1,000 and costs on the claim based on an I.O.U. The suit was filed on October 31, 1951 and fixed for hearing on November 28, 1951. Five adjournments were applied for and granted to the appellant on various grounds. On January 23, 1952 the President of the Sessions Court fixed the case for hearing on February 27, 1952 after warning the appellant's attorney that this was the final postponement. On February 27, 1952 counsel for the appellant asked for further postponement and produced a medical certificate. The President refused further postponement and proceeded with the hearing of the case. The appellant appealed.

Held, that the appellant had ample opportunities to present his case before he became ill and failed to do it and the President was justified in refusing to act upon the medical certificate and has exercised his discretion rightly in refusing to grant further adjournment.

Cases referred to:—

(1) *Maxwell v. Keun & Ors.* (1928) 1 K.B. 645.

(2) *Dick v. Piller* (1943) W.N. 123; (1943) 1 All E.R. 627.

APPEAL from the Sessions Court at Kuantan.

J. S. H. Skrine for the appellant.

Respondent in person.

Cur. Adv. Vult.

Whitton, J.: — This is an appeal against a judgment of the President, Sessions Court, Kuantan, in favour of the respondent for the sum of $1,000 and costs on a claim based on an I.O.U.

It is necessary to recapitulate briefly the history of the proceedings in the Lower Court. The suit was filed on 31st October 1951 and fixed for hearing on 28th November 1951. On the 28th November a firm of solicitors sent a telegram to the Court stating they would be unable to represent the defendant (now appellant) on the following day. On 28th November the defendant was represented by his Attorney, though, as far as the President's recollection goes, the latter did not disclose the fact that he was an Attorney and not the defendant appearing in person. On that day, presumably on the strength of the telegram I have mentioned, the case was postponed to 19th December for hearing. On 29th November a letter was received from the defendant's solicitors asking for a postponement and stating "any date after 11th February 1952 will be suitable to us". On 10th December a further letter was received by the Court from the defendant's solicitors stating *inter alia* that "Our client has suddenly been called to India on an urgent matter and we shall be glad if the suit can be put off to some date in February 1952 when he is expected to return". On 19th December the President agreed, though as he says with some reluctance, to postpone the case until 23rd January 1952. Before that date a further request for postponement was received from the defendant's solicitors on the ground of other Court engagements. On 23rd January the President fixed the case for hearing on 27th February after warning the defendant's Attorney that this was the final postponement. On 27th February counsel from a different firm of solicitors appeared on behalf of the defendant, and asked for a postponement until 10th May. A medical certificate issued in India dated 15th February, 1952 was produced stating the defendant was "suffering from chronic dyspepsia and he is advised to undergo treatment, including dieting for three months". The President refused further postponement, and counsel for the defendant then withdrew from the proceedings. The plaintiff then gave evidence on his own behalf. The defendant's Attorney though present in Court offered no defence. The President then made the decision which is now appealed against. There is no suggestion the plaintiff was not prepared to proceed on any of the dates of hearing which were successively fixed. It is agreed that on 28th November when the case was first fixed for hearing the defendant was still in Malaya, though he was already making preparations to go to India.

The appeal is on the following ground:—

"As the defendant was in India and he produced a medical certificate and in view of the fact that Counsel for the defendant offered to pay into Court the amount claimed by the plaintiff, the learned trial Judge was wrong in not granting the postponement asked for."

In the leading English case on this subject, *Maxwell v. Keun & Ors.*[1], it was laid down that the Court of Appeal ought to be very slow to interfere with the discretion vested in a Judge by Order XXXVI r. 34 with regard to such a matter as the adjournment of the trial of an action before him, but that if the Court of Appeal was satisfied the result of the refusing of

an adjournment would be an injustice to one or other of the parties, the Court had power to review the order, and it was its duty to do so. The matter was put in the following language by Atkin, L.J. in that case :—

"The result of this seems to me to be that in the exercise of a proper judicial discretion no Judge ought to make such an order as would defeat the rights of a party and destroy them altogether, unless he is satisfied that he has been guilty of such conduct that justice can only properly be done to the other party by coming to that conclusion."

In the judgment of the Court of Appeal in *Dick v. Piller*[2] the following passage appears :—

"If a judge was satisfied that a witness was prevented by illness from attending the Court and that his evidence was relevant and might be important, it was his duty to grant an adjournment, it might be on terms, unless he was satisfied that injustice might be done to the other side which could not be reduced by costs. "A fortiori" this was the duty of the judge if the witness were a party."

Now in both these cases, it is clear from a study of the reports, the aggrieved party never had a reasonable opportunity of giving evidence on his own behalf to the Court. In the earlier one the plaintiff, an Army Officer serving in India, could not have reached England in time for the hearing. In the other one the defendant became ill, a fact which was supported by medical certificates, before the hearing reached the stage for him to give his evidence. In the present case there is no doubt, as far as the available information goes, that the appellant was in a position to appear in Court and to give evidence on his own behalf on November 28th. There is no suggestion that he was not served personally with the summons while he was still in Kuantan.

I concede that the passage from Atkin, L.J.'s judgment quoted above would at first sight appear to be in favour of the present appellant. I do not doubt that the President's decision will have the effect, if not reversed, of defeating and destroying altogether the appellant's rights, and I am not prepared to say that such a decision was essential to secure justice to the other party. I am also satisfied that the appellant's evidence was relevant and important. But further reflection on the matter makes me feel that the principles laid down by Atkin, L.J. must, to be accurately appreciated, be considered against the background of the case in respect of which they were stated. To illustrate what I mean, suppose that in the present case the Court had been informed on November 28th the appellant had chosen to attend, say, a race meeting or to occupy himself in some other way equally lacking in merit regarded as a ground for failure to attend Court, and judgment had been entered against him in spite of an application for a postponement on his behalf, his rights would have been defeated and destroyed, just as they have in the actual circumstances of the present case, but it is scarcely imaginable it would be argued that the President had exercised his discretion wrongly in refusing a postponement.

In my view, to put the matter broadly, the two English cases referred to are authority for the proposition that in all actions each party must be given a reasonable opportunity to present his case, but subject to the general principles stated, they are no authority for saying that a party is entitled to more than one reasonable opportunity.

In the present case the appellant had a reasonable opportunity to have his evidence taken on 28th November 1951 as far as the records show. It may have been inconvenient for him to attend; he may have thought he could be represented adequately by his Attorney; he may have briefed his earlier solicitors too late for them to advise him to the best advantage. These are speculations which might, if correct, have been established as facts before the learned President by affidavit or other means on 27th February as grounds for further postponement; and had any such grounds been shown to exist, and the learned President had, nevertheless, refused a postponement, it seems to me there would have been some case for ordering a re-trial. But no such grounds were submitted to the President. The Court was asked to grant a postponement because the defendant was in India, a medical certificate being produced to the effect that (on February 15, 1952) he was suffering from chronic dyspepsia and had been advised to undergo treatment for three months. This Appeal is based on the President's refusal to grant a postponement on these grounds. (The fact that a sum equal to the claim has been paid into Court does not, in my opinion, affect the main issue involved). Had it been shown to my satisfaction the appellant had not enjoyed an opportunity to give his evidence before he departed for India I should certainly have held that the grounds put forward by his counsel on the 27th February were proper grounds for granting a postponement in spite of the long history of postponement which had previously characterised the case. As the absence of such an opportunity has not, in my opinion, been established, I do not consider the contention that the learned President exercised his discretion wrongly can succeed.

The appeal is dismissed with costs.

Appeal dismissed.